April 18, 1969, the Union had demanded "immediate arbitration" and that Flair had refused. In its answer to the amended complaint, Flair asserted various defenses, including abandonment of the contract and laches in asserting "any purported rights or claims thereunder."

After an evidentiary hearing, the District Court concluded that the Union had been "guilty of laches by its unjustified delay in the enforcement of its contract with defendant," and dismissed the complaint. The Court of Appeals for the Seventh Circuit, with one judge dissenting, agreed that laches was a bar to the Union's belated assertion of the right to arbitrate, and affirmed the judgment of the District Court.

In its opinion today, the Court looks solely at the clause in the master collective-bargaining agreement which provided for arbitration of "any difference" between the parties, and holds:

> "[T]hat the parties meant what they said—that 'any difference,' which would include the issue of laches raised by respondent at trial, should be referred to the arbitrator for decision." [1]

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[1] It should be noted that this language was added to the master contract in 1966 without the knowledge of Flair, at a time when it had every reason to believe that the Union—from which it had heard nothing for more than two years—had abandoned the initial memorandum agreement of May 12, 1964. Flair had no union employees, and had received no demands or notices of any kind from the Union. But whatever the situation may have been in 1966, the subsequent history of this remarkable performance corroborates the view that neither Flair nor the Union was conscious of the existence of a collective-bargaining agreement or of a right to arbitrate anything.

Even after a union business agent visited Flair's jobsite in 1968 and discovered "a non-union employee operating a piece of equipment," no action was taken by the Union until a suit for specific performance and damages was filed some five months later. No demand was made for arbitration, and no claim of any right to arbitration was made in the original complaint. The District Court,

Yet the phrase "any difference," if given its normal meaning in a labor contract, refers to disputes relating to hours, wages, fringe benefits, seniority, grievances, and to other issues customarily arising within the terms of a collective-bargaining agreement. I cannot believe that this language was intended to include the arbitration of an equitable defense asserted against the enforceability of the *entire* contract. Indeed, the Union itself did not construe the language to cover arbitration of this issue, as it asserted no such claim until after the District Court suggested it.[2]

But my dissent does not turn solely on an interpretation of the arbitration clause or of any other provision of the agreement. The defense of laches is equitable in nature. The customary situation in which it is invoked is where a contract *does* exist and, but for laches of one of the parties, would be enforceable. In this case, Flair relied in substance on two defenses: (i) that the 1964 memorandum agreement (the only agreement Flair ever signed) had been abandoned by the Union; and (ii) that even if it had not been abandoned and the arbitration clause was as broad as this Court construes it to be, the defense of laches was available as an affirmative defense. The essence of the latter defense is that the Union, by virtue of its conduct and Flair's reliance thereon, was estopped and precluded from enforcing any and all provisions of the contract, including the arbitration clause. This position was sustained by the courts below. The Court of Appeals correctly held:

> "The factual context of this appeal thus narrows the issue before us to the question of whether a party

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not the Union, first suggested the possibility of arbitration. In these circumstances, and with all respect, I find no support whatever in the record for the Court's holding "that the parties did in fact agree to arbitrate."

[2] See n. 1, *supra*.

to a collective bargaining agreement which contains an arbitration clause may be so dilatory in making the existence of vaguely delineated disputes known to the other party that a court is justified in refusing to compel the submission of such disputes to arbitration." 440 F. 2d 557, 559 (1971).

The District Court, which heard the testimony of the parties, emphasized the burden imposed upon Flair by the Union's prolonged and unexplained delay and the ambiguity of its various positions:

> "To require Flair to respond, through arbitration, to general charges of noncompliance with contract provisions allegedly beginning more than two years before this suit was filed would impose an extreme burden on its defense efforts. Especially is this so when, as demonstrated at the hearing, Flair understandably considered the contract to have been abandoned soon after its inception. Plaintiff has offered no explanation for its delay in enforcement; yet to compel arbitration would reward plaintiff for its own inaction and subject defendant to the risk of liability because of actions taken or not taken in reliance on plaintiff's apparent abandonment."

I am aware of the strong policy considerations in favor of the arbitration of union-management disputes. *John Wiley & Sons* v. *Livingston*, 376 U. S. 543 (1964). But neither *Wiley*, nor any other case to my knowledge, has forced arbitration upon a party in circumstances such as these, where the equitable doctrine of laches was clearly applicable and was asserted. We would be well advised to recall Chief Justice Marshall's admonition:

> "[I]t is desirable to terminate every cause upon its real merits, if those merits are fairly before the court, and to put an end to litigation where it is in

the power of the court to do so." *Church* v. *Hubbart*, 2 Cranch 187, 232 (1804).

The effect of today's decision on Flair seems fairly clear. The Court's opinion imposes on this small business the "extreme burden" that the District Court found would result from requiring arbitration. Mr. Justice Cardozo once observed that litigation is a rare and catastrophic experience for the vast majority of men.[3] If Flair survives the long excursion to this Court, the arbitration that the majority requires, and a possible return to the District Court which already has ruled in its favor, it surely possesses more tenacity and better financial resources than the average small business. One may doubt whether many small businessmen would believe today's result possible.

The effect of the Court's decision also could be far reaching in the law of labor-management relations. It appears that the long-accepted jurisdiction of the courts may now be displaced whenever a collective-bargaining agreement contains a general arbitration clause similar to that here involved. If in such circumstances the affirmative defense of laches can no longer be invoked in the courts, what of other affirmative defenses that go to the enforceability of a contract? Does the Court's opinion vest in arbitrators the historic jurisdiction of the courts to determine fraud or duress in the inception of a contract? It seems to me that the courts are far better qualified than any arbitrators to decide issues of this kind. These are not questions of "labor law" nor are they issues of fact that arbitrators are peculiarly well qualified to consider. They are issues within the traditional equity jurisdiction of courts of law and issues which the courts below appropriately resolved. I would affirm the judgment of the Court of Appeals.

[3] B. Cardozo, The Nature of the Judicial Process 128 (1921).